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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems	)	WT Docket No. 96-18
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding	)	PP Docket No. 93-253

To: The Commission, *en banc.*

PETITION FOR CLARIFICATION AND RECONSIDERATION

Kenneth E. Hardman
MOIR & HARDMAN
2000 L Street, N.W., Suite 512
Washington, DC 20036-4907
Telephone: (202) 223-3772
Facsimile: (202) 833-2416

Attorney for AirStar Paging, Inc.

April 11, 1997

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SUMMARY OF PETITION FOR CLARIFICATION AND RECONSIDERATION

1. The SR&O is ambiguous with respect to its intended disposition of J & M Paging, Inc.'s (now AirStar Paging, Inc.) finder's preference request in Case No. 96F191, which was granted by the Wireless Telecommunications Bureau on December 19, 1996, and the Commission should explicitly clarify that it is not being dismissed by the SR&O. Assuming *arguendo* that the SR&O intended to dismiss J & M Paging, Inc.'s finder's preference request, the decision is unlawful and should be reconsidered and reversed.

2. No fair notice was provided in the *Notice of Proposed Rulemaking* that the Commission may dismiss pending finder's preference requests, *in addition to* terminating the program; and no analysis whatsoever is provided in support of the decision. Additionally, the SR&O does not and cannot make the showing required to support retroactive application of the new rule, as required under *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

3. The Commission also should reconsider, at least in part, its decision not to institute geographic licensing for shared paging channels, and should institute such licensing at least for the five 929 MHz shared paging channels. The SR&O's reasoning was incorrectly extended to 929 MHz from the VHF and UHF frequency bands.

4. A geographic license for a shared channel actually should be *more* valuable, not less, than the license for many exclusive channels, due to the fact that the remaining "white space" on many exclusive channels is very limited. By contrast, the shared channel license inherently will afford the license the right to establish service *throughout* the licensed area, without being "blocked" by the incumbents.

5. The improvement in spectrum efficiency from instituting geographic licensing of shared channels actually is likely to be much more substantial than with the exclusive channels. This is due to the fact that licensees would be encouraged to invest in highly spectrum-efficient time-sharing arrangements in lieu of the existing air monitoring systems contemplated by the rules.

6. The issue of consumer fraud in paging licensing obviously is not resolved at all by the SR&O, and the attempt to tighten application regulations undoubtedly will prove to be a fool's errand.

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To: The Commission, *en banc.*

PETITION FOR CLARIFICATION AND RECONSIDERATION

AIRSTAR PAGING, INC. (f/k/a J & M Paging, Inc. d/b/a Bell Paging Company) ("AirStar"), by its attorney, hereby respectfully petitions the Federal Communications Commission for clarification and reconsideration in part, as set forth more fully hereinafter, of its Second Report and Order and Further Notice of Proposed Rulemaking (the "SR&O") in the captioned proceeding, FCC 97-59, adopted February 19, 1997 and released February 24, 1997, 62 Fed. Reg. 11616 (March 12, 1997).

More specifically, AirStar requests that the Commission clarify that AirStar's Finder's Preference Request for 929.0125 MHZ in southern California,[1] which was granted by the staff of

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[1] *In the matter of Nationwide Paging, Inc.*, Case No. 96F191 (filed January 30, 1996). The finder's preference request was filed when petitioner's corporate name was J & M Paging, Inc. That name was subsequently changed to resolve a commercial dispute concerning alleged infringement of service marks.

the Wireless Telecommunications Bureau under delegated authority on December 19, 1996,[2] is not deemed to be a "pending" finder's preference request for purposes of the Commission's ruling in ¶18 of the SR&O that "[a]ll pending finders' preference requests are dismissed".[3] Alternatively, if the Commission intended to dismiss AirStar's finder's preference grant by virtue of ¶18 of the SR&O, AirStar requests that the Commission reconsider and reverse its decision.

Additionally, AirStar requests that the Commission reconsider, in part, its decision not to award geographic licenses and hold auctions for shared channels available for paging service under Part 90 of the rules. As explained below, AirStar believes that the Commission properly can and should auction geographic licenses for the five shared 929 MHZ paging channels, even if it does not otherwise believe that the public interest would be served by the auctioning of licenses for shared PCP channels.

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[2] *Notice to Target Licensee of Automatic License Cancellation and 30 Day Right to Appeal,* Case No. 96F191, December 19, 1996; *Partial Award of Dispositive Preference,* Case No. 96F191, December 19, 1996.

[3] The target licensee sought reconsideration of the grant on January 21, 1997, and its petitions for reconsideration are still pending before the Bureau for decision. AirStar has not yet filed its applications for 929.0125 MHZ in southern California pursuant to its dispositive preference, because the pending petitions for reconsideration have tolled the time for AirStar to do so.

In support of its petition, AirStar respectfully shows:

Background

In this proceeding the Commission has promulgated rules to transition the commercial paging industry to a system of geographic licenses, in lieu of the current site-specific licensing rules, and to award geographic licenses for channels pursuant to a scheme of competitive bidding in auctions. As part of its decision, the Commission ruled that:

> We also eliminate finders' preferences immediately for paging services. All pending finders' preference requests are dismissed, and we will no longer accept finders' preference requests following the adoption of this *Second Report and Order.*

SR&O at ¶18. (Emphasis in original).

Additionally, the Commission decided not to convert any of the shared paging channels licensed under Part 90 to geographic licensing, notwithstanding that it had initially proposed to do so. SR&O at ¶¶40-42; SR&O at ¶37. The Commission concluded that "the cost and disruption that would be entailed by such a transition outweighs any benefits that would be achieved" (*id.* at ¶40); that "creating geographic overlay licenses on these channels would [likely not] significantly improve efficiency of spectrum use" (*id.* at ¶41); and that "granting 'exclusive' rights to a geographic licensee would have little practical value" because of the "heavy existing use of the channels on a shared basis". *Id.*

which is currently on appeal to the Wireless Telecommunications Bureau. Additionally, AirStar provides paging service on the shared paging channels 929.0875 MHZ and 929.2625 MHZ on a regional basis in California, Nevada and Arizona.

Argument for Clarification and Reconsideration

1. The Commission Should Clarify that AirStar's Finder's Preference Request Is Not Being Dismissed, or Should Reconsider and Reverse Its Decision.

AirStar has quoted above the Commission's entire discussion on the finder's preference issue, and the Commission did not otherwise specifically reference the status of AirStar's finder's preference request in the SR&O. Accordingly, it is completely unclear what the Commission intended to do with respect to AirStar's request; and colorable arguments can be made either way as to the proper interpretation of its decision. Therefore, on reconsideration, the Commission should explicitly clarify its intended disposition with respect to AirStar's finder's preference request.

If the Commission intended, as it properly should, to process the target licensee's appeal in AirStar's case through its natural course and, if unsuccessful, to allow AirStar to fully implement the dispositive preference it has been granted for 929.0125 MHZ in southern California, that is the end of the issue insofar as this proceeding is concerned. AirStar therefore urges the Commission to clarify that this was its intent.

issue insofar as this proceeding is concerned. AirStar therefore urges the Commission to clarify that this was its intent.

On the other hand, if the Commission intended in the SR&O to dismiss AirStar's finder's preference request without any further action, the decision lawfully should be reconsidered and reversed.

Assuming *arguendo* that the Commission intended to dismiss AirStar's finder's preference request by the SR&O, AirStar points out that the Commission's "discussion" of the issue falls far short of the reasoned analysis required under the Administrative Procedures Act to sustain the Commission's decision.[4] In fact, the "discussion" is devoid of any reasoning or analysis whatsoever; only the Commission's bare conclusion is stated.

Moreover, when the Commission stated in the *Notice of Proposed Rulemaking* that it intended to eliminate the finder's preference program when it adopted geographic licensing,[5] it said nothing whatsoever about dismissing previously filed requests without action. Thus, the commenting parties have had no fair

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[4] *See, e.g.*, 5 U.S.C. §706(2)(admonishing a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law ...").

[5] *Notice of Proposed Rulemaking,* WT Docket No. 96-18, 11 FCC Rcd 3108, 3113 & ¶22 (FCC 1996). The Commission's complete discussion consisted of one terse sentence stating simply that "[t]o the extent we adopt geographic licensing, we propose to eliminate the finder's preference." *Id.*

notice as required by the Administrative Procedures Act that, *in addition to* terminating the finder's preference program, the Commission would dismiss *pending* finder's preference requests without action when it ultimately adopted the rules for geographic licensing.[6]

The Commission subsequently did initiate a rulemaking proceeding in WT Docket No. 96-199 in which it arguably suggested that it might dismiss then-pending finder's preference requests in frequency bands other than the 220 MHZ band ostensibly at issue in that proceeding.[7] The Commission was clear, however, that it would do so, if at all, *as a result of the Commission's decision in that proceeding. Id.*

The Commission has not issued a decision in WT Docket No. 96-199, so it cannot bootstrap its decision here on the basis of that proceeding. Moreover, the comments in that proceeding overwhelming opposed the Commission's proposal, making it doubtful that the Commission lawfully could implement its proposed rule in that case. A copy of AirStar's opposition comments in that case (filed in the name of J & M Paging, Inc.), which are illustrative of the position of the commenting parties

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[6] *See* 5 U.S.C. §553(b) and cases decided thereunder concerning the notice required by law of the rules ultimately adopted in a rulemaking proceeding.

[7] *Notice of Proposed Rulemaking*, WT Docket No. 96-199, 11 FCC Rcd 13016, 13021 & ¶11 (FCC 1996).

in that case, is attached hereto for the Commission's convenient reference.

Equally importantly, the Commission's decision utterly fails to demonstrate that the adverse effects of retroactive application of its new rule by dismissing pending finder's preference requests are outweighed by the public interest benefits that such dismissal would promote. Such a demonstration is clearly required in order to sustain retroactive application of the new rule to AirStar's finder's preference request.[8]

Nor could the Commission make such a showing, because the fact is that summary dismissal of AirStar's finder's preference request at this point would serve no identifiable public interest benefit whatsoever. On the other hand, it would be egregiously unfair to AirStar to now deprive it of its anticipated dispositive preference for 929.0125 MHZ in southern California after AirStar expended the time and resources to investigate and document for the Commission the licensee's failure to timely place the channel in operation as required by the rules.

In short, the public interest purpose of the finder's preference program as an aid to the Commission's enforcement has

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[8] *See, e.g., SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 389-90 (D.C.Cir. 1972); *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1554-55 (D.C.Cir. 1987).

been fully served in AirStar's case, and it would be truly perverse to now "reward" AirStar for its efforts by summarily dismissing its request.

In this regard, it is also worth pointing out that the target licensee in AirStar's case cannot recover its exclusive channel, regardless of whether or not AirStar's finder's preference request is summarily dismissed. That is, the Commission has ruled in AirStar's case that the target licensee has forfeited its exclusivity on 929.0125 MHZ in southern California pursuant to Section 90.495© of the rules. That ruling is not affected by the Commission's disposition of AirStar's finder's preference request.

Thus, dismissing AirStar's finder's preference request at this point would not resurrect the target licensee's exclusivity on 929.0125 MHZ; instead, doing so would only make that channel more desirable in the auction because of the additional "white space" created. Stated another way, the only discernable purpose served by dismissing AirStar's finder's preference request at this juncture would be to inflate the bidding at the auction, contrary to 47 U.S.C. §309(j)(7).

2. The Commission Should Award Geographic Licenses through Auctions for at Least the Five 929 MHZ Shared Paging Channels.

As a separate matter, the Commission also should reconsider and reverse its decision not to award geographic licenses by

auction for the shared 929 MHZ paging channels, because the Commission's reasoning on this issue simply is not fairly applicable to 929 MHZ.

First of all, it is simply not true that a geographic license for the 929 MHZ shared channels "would have little practical value," as the Commission believes. A geographic license would afford the licensee the last right to time-share a channel throughout the entire region covered by the license.[9] By contrast, a geographic license on the 929 and 931 MHZ exclusive channels does *not* automatically afford the licensee the right to serve the entire area, because the license can serve only the "white space" left over from incumbent licensees, and then only to the extent the geographic licensee can provide service while affording the incumbents sufficient co-channel protection. For this reason, a geographic license on a shared 929 MHZ channel actually is likely to be *more valuable* than the license for many of the exclusive channels.

Similarly, the practical effect of auctioning geographic licenses for the shared 929 MHZ channels would be to enhance and

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[9] Since the license would convey a "last right" to time share, there would clearly be the requisite mutual exclusivity to support an auction in conformance with the requirements of 47 U.S.C. §309(j). To this extent, at least, the commenting parties are incorrect when they claim that auctioning geographic licenses for shared channels would be unlawful for lack of the requisite mutual exclusivity.

expand the use of highly efficient time-sharing modes in lieu of off-the-air monitoring, which is now the norm contemplated in the Commission's rules. This is so because it would be in the geographic licensee's interest to implement such highly efficient sharing modes in order to maximize spectrum capacity. Further, since the licensee would not have to plan against the possibility of dealing with an unlimited number of additional entrants on the channel, the geographic license would greatly facilitate the licensee's ability to implement the efficient sharing mechanisms.

Moreover, the licensee would have a greater incentive to make the investment in equipment necessary to support efficient time sharing if it does not have to plan against the possibility of an unlimited number of additional entrant on the channel. In short, it simply is not true that geographic licensing would not significantly improve spectrum efficiency on the shared 929 MHZ channels. In fact, the increase in spectrum efficiency resulting from geographic licensing on shared channels is likely to prove far more dramatic than on the existing exclusive channels.

The SR&O also suggests -- incorrectly in AirStar's view with respect to 929 MHZ -- that the existing systems on shared channels tend to be local rather than wide area systems. The growth of regional paging networks in recent years has been fueled in substantial part by the development of satellite control systems, which also enable the implementation of highly

efficient time-sharing mechanisms on shared channels. AirStar itself has implemented regional paging networks on the shared 929 MHZ channels and believes that its usage of these channels is more typical than not. Thus, contrary to the Commission's evident position, AirStar believes that geographic licensing would confirm and facilitate the growth of wide area systems on the shared 929 MHZ paging channels.

AirStar also believes it is fair to say that the shared 929 MHZ channels are loaded far less extensively than the VHF and UHF shared channels. Accordingly, automatically applying the same conclusions concerning the benefits of geographic licensing to all of the current shared channels, as was done in the SR&O, is unwarranted.

Finally, AirStar points out that the SR&O obviously did not resolve the issue of consumer fraud in paging licensing, about which the Commission professes to be concerned. Instead, the SR&O bucks the issue to a further rulemaking, suggesting that steps such as tightening application requirements may put a stop to unsavory licensing businesses.

The short response is that such endeavors are likely to be no more than fools' errands. Despite many similar attempts previously, the Commission has never been able to screen out these kinds of applications, and there is absolutely no reason to believe it will be any more successful this time. The only

practical solution available under current regulatory philosophy that is likely to be effective is to institute geographic licensing.

Conclusion

For the reasons stated above, the Commission should clarify that it is not dismissing AirStar's finder's preference request in Case No. 96F191, and should establish geographic licensing and auctions for the five 929 MHZ shared paging channels.

Respectfully submitted,

AIRSTAR PAGING, INC.

By: Kenneth E. Hardman

Its Attorney

MOIR & HARDMAN
2000 L Street, N.W.
Suite 512
Washington, DC 20036-4907

April 11, 1997

EXHIBIT A -- COMMENTS IN OPPOSITION TO NPRM

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	WT Docket No. 96-199
Amendment of Part 90	)	
Concerning the Commission's	)	
Finder's Preference Rules	)	

To: The Chief, Wireless
Telecommunications Bureau

COMMENTS IN OPPOSITION TO NPRM

J & M PAGING, INC. (J&M), by its attorney, respectfully submits its comments in opposition to portions of the Notice of Proposed Rule Making (NPRM) in the captioned proceeding, FCC 96-383, adopted September 17, 1996 and released September 27, 1996. In opposition thereto, J&M states as follows:

The NPRM explicitly proposes to eliminate the finder's preference program for the 220-222 MHz band (NPRM at ¶9); but ambiguously references the 470-512 MHz, 800 MHz and 900 MHz bands and then goes on to seek "comment on whether the finder's preference program should be discontinued in its entirety" (NPRM at ¶10).

Moreover, the NPRM goes on to "propose to retain the discretion to dismiss pending finder's preference requests for *any services* in *any frequency bands* in which we decide to

eliminate the finder's preference program as a result of this proceeding" (NPRM at ¶11) (emphasis added), thus suggesting that the entire finder's preference program (which is unique to Part 90 of the Commission's rules) really may be at issue in this proceeding. The NPRM argues that "persons with finder's preference requests on file would not be substantially harmed because *there would be an opportunity to apply for the unused frequencies once they become available for licensing*" (*id.*) (emphasis added); and that, specifically with reference to the 220-222 MHZ band, such persons "may apply for the geographic licenses covering the areas that are subject of their finder's preference requests." (*Id.*).

J&M has a finder's preference request pending in File No. 96F191 for the exclusive private carrier paging frequency 929.0125 MHz in southern California. The Commission ruled on April 30, 1996 that J&M had made out a *prima facie* case for its request, and a final ruling in the case is now pending. As noted above, the NPRM is ambiguous as to whether or not the outcome of this proceeding may directly or indirectly affect the processing of J&M's request for 929.0125 MHz. Nonetheless, the NPRM's supporting analysis is so thoroughly wrong-headed with respect to the treatment of pending requests that J&M is constrained to comment whether or not the NPRM will affect its request.

It is impossible to understand how the NPRM can contend with a straight face that persons with pending finder's preference requests "would not be substantially harmed" by their dismissal, because they would have "the opportunity to apply for the unused frequencies once they become available for licensing". As the Commission well knows, parties filing such requests must expend substantial time and resources -- prior to filing such requests -- to investigate the facts pertaining the target licensee's failure to construct its authorized facilities or to place or keep them in operation. Assuming the allegations uncovered by their investigation prove out, the requesting party then obtains a "dispositive preference" for the frequency(ies) in question, *i.e.*, is guaranteed a license for the frequency(ies) assuming it timely follows through with the procedures and requirements specified in the rules.

By contrast, what the NPRM proposes is that after expending the substantial time and resources to identify the unused spectrum for the Commission (and doing so in anticipation of receiving a "dispositive preference" for it), the party would instead obtain only the opportunity to bid against the rest of the world in an auction for the geographic license. Contrary to the NPRM's professed claim that a party "would not be substantially" harmed by this turns of events, such a retroactive

change in policy would not only be egregiously unfair to the parties which expended their time and resources in reliance upon receiving the benefits of their investigation, but also would be impossible for the Commission to lawfully justify.

Under these circumstances, the Commission should promptly and absolutely abandon its attempt to undercut pending requests for finder's preferences, and should instead determine to promptly process them to their natural conclusion under existing rules and policies.

Respectfully submitted,

J & M PAGING, INC.

By: Kenneth E. Hardman

Its Attorney

MOIR & HARDMAN
2000 L Street, N.W.
Suite 512
Washington, DC 20036-4907
Telephone: (202) 223-3772
Facsimile: (202) 833-2416

Dated: November 18, 1996